FILED
JUN 10 1991
OFFICE OF THE CLERK

No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

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Dated: June 10, 1991

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TABLE OF AUTHORITIES

Page

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 2

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 153 (1986) 2

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 2

Federal Power Act (FPA), 16 U.S.C. §§ 791-828(c)(1988) 2

Public Utility Act of 1935, S. Rep. No. 621, 74th Cong. 1st Sess. 18 (1935) 6

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

The brief of the United States demonstrates that it is a simple matter to arrive at a conclusion if one first assumes it as a premise. That proof, however, is unremarkable and leaves unanswered the question that is properly before this court: did Congress intend that the Federal Energy Regulatory Commission (FERC), by virtue of its jurisdiction over wholesale rates, should preempt state authority in deciding how much and when money must be set aside in a trust fund for the decommissioning of a nuclear power plant located on that state's own soil.

As to the first argument offered by the Solicitor General, a holding by the Maine Court that the Nuclear Decommissioning Financing Act (NDFA) is health and safety regulation and therefore preempted by Nuclear Regulatory Commission (NRC) regulation would be an interpretation of Constitutional law that decommissioning financing is health and safety regulation over which the Federal Government has exclusive jurisdiction. Not only is any such holding incorrect, since several states already regulate decommissioning financing, but it is also one of the Constitutional points at issue in this proceeding. This Court owes no deference to the Maine Court on the interpretation of Constitutional law. The Solicitor's argument assumes that the finding of Federal preemption can be made without reaching Constitutional issues thereby foreclosing this Court's review. Such an argument is wrong.

It is clear that the matter before the Court involves economic regulation; indeed, that is why the United

States contends that MPUC violated FERC orders and not Nuclear Regulatory Commission orders. In making its second argument, however, the United States simply assumes that economic regulation and ratemaking are synonymous. Specifically, it assumes that FERC's authority to reflect decommissioning funding costs in rates is synonymous with the authority to dictate what those costs will be. Yet the two powers are clearly non synonymous. If they were, FERC would have the authority to dictate State and Federal taxes or labor costs since these are also reflected in rates. Congress clearly cannot have intended to grant FERC authority to dictate costs simply by virtue of its ratemaking authority. Such an assumption is both illogical and insupportable by any reasoned analysis of the Federal Power Act (FPA), 16 U.S.C. §§ 791-828(c) (1988), or this Court's precedents. The Solicitor General's analysis on this point amounts to nothing more than this assumption and is not very helpful to deciding this case. The Solicitor's brief contains no discussion of Congressional intent to invest the FERC with such extra-ratemaking preemptive authority and no analysis of the FPA or any other Legislative act that confers upon FERC this extraordinary authority in the particular case of decommissioning costs. Yet without this assumption, the Solicitor's "analysis" simply melts away.

If Congress has not granted FERC authority to dictate these costs, then the fact that they appear, like any other cost, in FERC rate tariffs is immaterial to the State's authority and the principles established in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 153 (1986), and *Schneidewind v. ANR Pipeline Co.*, 485 U.S.

293 (1988), have no more bearing than they would in the case of taxes or labor costs.

If FERC has not been granted authority by Congress to dictate these costs, then the fact that these costs, like any other cost that must be recovered by the utility, "are integral to the rates the utility may charge its customers," (brief of the United States, page 13) is irrelevant. The fact that "Maine Yankee's rates are directly dependent upon" (*Id.*) its costs is not an argument for Federal preemption.

If FERC has not been granted authority by Congress to dictate these costs, then the State does not need to challenge FERC rate orders in order to impose them. There is no constitutionally relevant "conflict" with FERC rate orders every time the costs of producing electricity change. The utility simply files for new rates to reflect its new costs[1]; no one "appeals" the old rate order.

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[1] The MPUC offers no opinion as to the propriety of FERC's 1988 "stay out" provision. Reexamination by FERC of the appropriateness of that order in light of Maine Yankee's changing costs may be warranted. But it is clear that a procedural "stay out" provision cannot preempt the State from imposing legitimate costs. The Constitutional limits of State authority to regulate decommissioning funding are not matters to be resolved by FERC procedural orders in individual rate case determinations. It is the intention of Congress that controls the preemptive effect of FERC rate orders. If the "stay out" provision works unreasonable hardship upon Maine Yankee, that is a matter for Maine Yankee to address at FERC, but the State's authority is not thereby implicated.

Preemptive authority cannot arise simply because decommissioning costs were reflected in rates by FERC before Maine acted to establish funding requirements, although this illogical conclusion is implicit in the Solicitor General's argument. The fact that FERC required ratepayers' payments to be isolated and put in trust did not convert the decision of how much and when funds must be paid into such a trust fund to a ratemaking function. There are logical reasons that the FERC required electric utilities to put the funds provided by ratepayers for decommissioning costs into an external trust fund, as the NRC now requires the nuclear plant owner to do, regardless of whether the owner receives the money from ratepayers. Maine law, also consistent with the same NRC regulations, now requires the trust funds to protect taxpayers and Maine citizens generally from the possible financial consequences of inadequate funding by a nuclear plant operator in Maine. The State of Maine is not preempted from imposing decommissioning funding costs because external funding was already required by FERC. The Maine Law leaves the decision of whether those costs should be reflected in rates, and the timing of when any such costs should be in rates to those agencies having ratemaking jurisdiction.

Finally, the Solicitor claims that "[t]he Supreme Judicial Court's determination that 'it is impossible for Maine Yankee to comply with both' FERC's Order and Petitioner's Order is not subject to serious dispute". (brief of the United States, page 15.) This may be true only in the sense that one does not "seriously dispute" assertions which are patently illogical. If Congress has not granted FERC authority to dictate decommissioning costs, then

the problem is one of regulatory lag not Federal preemption. Regulatory lag is not a matter of Constitutional concern unless so extreme as to verge upon a taking, and, even if found, the solution is not Federal preemption of cost escalation, but procedural acceleration. Costs in the electric industry routinely change at a pace that is one step (often several steps) ahead of the regulatory process. Changes in cost often affect the utility's return on equity until the next rate proceeding. Yet rate orders do not preempt cost escalation; neither does inflation generate "Constitutional conflict" with old rate determinations.

It is the intent of Congress in passing the FPA which determines the preemptive effect of FERC orders upon State legislation. FERC cannot expand the scope of its preemptive authority by means of its own regulations. The FPA does not contain any explicit grant of authority over decommissioning financing. Notably absent from the Solicitor General's analysis, however, is any consideration of Congressional intent as to the limits of FERC authority under the FPA. Yet in the debates surrounding its original passage, the issue of the limitation of Federal encroachment upon traditional State authority received much attention.

As indicated by the Senate Report on the final version of the bill that authorized the Federal regulation of wholesale electricity transactions, there was, in fact, a concerted effort made to limit the intrusion of Federal Power Commission (now FERC) authority into matters which could be effectively handled by State regulation.

> The revision has also removed every encroachment upon the authority of the States.

> The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.

Public Utility Act of 1935, S. Rep. No. 621, 74th Cong. 1st Sess. 18 (1935).

The State is competent to regulate financial planning for decommissioning in accordance with NRC regulations. Given such competence, there is no statutory support for the proposition that Congress intended FERC to preempt the State in this area.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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